

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Bally's Park Place, Inc., d/b/a Bally's Atlantic City and Karen W. Pringle, Petitioner and Teamsters Union Local 331 a/w International Brotherhood of Teamsters, AFL-CIO. Case 4-RD-1942.

October 21, 2002

DECISION ON REVIEW

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

Pursuant to a stipulated election agreement, an election by secret ballot was conducted in this matter on January 25, 2002. All of the ballots were impounded pending resolution of the unfair labor practice charge filed by the Union in Case 4-CA-31009. By letter dated May 21, 2002, the Regional Director denied the Employer's request that the impounded ballots be opened and counted based upon the Board's policy of holding in abeyance the processing of any representation case where an unfair labor practice charge is filed alleging as unlawful conduct which, if proven, would have a tendency to interfere with the free choice of employees in an election. See *United States Coal Co.*, 3 NLRB 398 (1937); *Big Three Industries*, 201 NLRB 197 (1973); NLRB Casehandling Manual (CHM), Section 11731.5.

The Employer filed a request for review of the Regional Director's determination not to open and count the impounded ballots and the Union filed a statement in opposition.

The Board has considered the Employer's request for review and the Union's opposition thereto and has decided to deny the Employer's request for review.

Our dissenting colleague does not contend that the Regional Director misapplied the Board's well-established "blocking charge" procedures in this case. Instead, he advocates a revision of those procedures as they apply to unfair labor practice charges based on conduct which could interfere with employee free choice in an election. We decline our colleague's invitation to reconsider those procedures in this case.¹

Dated, Washington, D.C. October 21, 2002

Wilma B. Liebman, Member

Michael J. Bartlett, Member
(SEAL) NATIONAL LABOR RELATIONS BOARD

¹ Member Bartlett agrees with his dissenting colleague that the Board should reconsider its "blocking charge" policy in circumstances where the unfair labor practice charge alleges conduct that could properly be alleged in a postelection objection. However, in the absence of a three-member Board majority to do so, he finds that the Regional Director properly applied that policy by impounding the election ballots pending resolution of the Union's unfair labor practice charge.

MEMBER COWEN, dissenting.

Contrary to the Regional Director, I would open and count the impounded ballots and issue a tally of ballots with respect to this decertification election.

This case demonstrates that the Board's current procedures allow a party to dictate whether or not election ballots will be impounded simply by choosing between two different procedural mechanisms for raising allegations of election misconduct. There are two procedural devices a party can use to bring before the Board alleged misconduct occurring during the critical period of an election campaign. One option is for the party to file an unfair labor practice charge alleging that a party has engaged in activities that both violate the Act and render a fair election impossible. The filing of such a charge can not only block the holding of the election, it can also cause the election ballots to be impounded should the petitioning union choose to proceed to an election.¹ Alternatively, the party can file a postelection objection that alleges election interference, in which case the ballots are counted and a tally of ballots issued.

In this proceeding, the Union filed an unfair labor practice charge during the critical period alleging that the Employer had violated Section 8(a)(5) of the Act by unilaterally changing its health insurance plan. Although the Union chose to proceed to an election, the charge served to block the ballot count. By contrast, if the Union had raised its refusal to bargain allegations as an election objection, the Region would have counted the ballots and prepared the election tally. Thus, whether a tally of ballots issued depended on the whim of the Union in filing unfair labor practice charges instead of election objections.

I find no justification for allowing a party to dictate whether a tally of ballots will issue simply by choosing to file an unfair labor practice charge instead of an election objection. To do so permits a party to manipulate and compromise the election process. In order to prevent this result and to promote consistency in the Board's election procedures, the Regions should open and count election ballots regardless of whether unfair labor practice charges or election objections have been filed. Accordingly, in the present case I would direct the Regional Director to open and count the ballots and issue a tally of ballots.

Dated, Washington, D.C. October 21, 2002

William B. Cowen, Member
NATIONAL LABOR RELATIONS BOARD

¹ This involves application of the Board's "blocking charge" rule. The preamble to Sec. 11730 of the Board's Casehandling Manual (Part Two - Representation Proceedings) states, inter alia, that: "The Agency has a general policy of holding in abeyance the processing of a petition where a concurrent unfair labor practice charge is filed by a party to the petition and the charge alleges conduct that, if proven, would interfere with employee free choice in an election, were one to be conducted."